Appeal 1894

of Barnes for Appellant Clerk.

Filed Aug. 3, 1894.

...E OF APPELLEE TO MOTION TO DISMISS APPEAL.

...the Supreme Court of the United States,

October Term, 1894.

...TES T. SIMMS,
Appellant.

vs.

...NAH T. SIMMS,
Appellee.

402

Wm H. Barnes

In the Supreme Court of the United States,

October Term, 1897.

JAMES T. SIMMS,
Appelant.

vs.

HANNAH T. SIMMS,
Appellee.

Comes now the appellee, by her counsel in that behalf, and moves the court to dismiss the appeal in the above entitled cause for want of jurisdiction, because the judgment or decree from which said appeal purports to have been taken, is the judgment or decree of the Supreme Court of one of the Territories of the United States, to-wit: The Supreme Court of the Territory of Arizona, affirming a judgment or decree of a District Court of said Territory, dismissing a bill for divorce brought by said appellant against said appellee in said District Court, and awarding appellee alimony and counsel fees PENDENTE LITE; and for the further reason that the matter in dispute does not exceed the sum of Five Thousand Dollars, exclusive of costs.

W. H. BARNES,
Counsel for Appelle for the purpose of this motion.

In the Supreme Court of the United States.

JAMES T. SIMMS,
Appellant.
vs.
HANNAH T. SIMMS,
Appellee.

Brief of Appellee on Motion to Dismiss Appeal.

STATEMENT.

This is a bill for divorce brought in the District Court of Maricopa County, Arizona, by James T. Simms, appellant, against his wife, Hannah T. Simms, Appellee

The bill was filed October 6th, 1894, and such proceedings were had in the cause that on the 13th day of June, 1896, a final decree was entered in the cause, dismissing appellant's bill and awarding appellee one hundred and fifty dollars per month from December 14th, 1893, to the date of said decree as alimony PENDENTE LITE, and seven hundred and fifty dollars counsel fees, which decree and order of entry of same, are as follows:

TITLE OF COURT AND CAUSE.

This cause having heretofore come on for hearing, and having been referred to a referee, and the testimony therein having been taken, and after the same having been argued to the court by counsel for respective parties hereto, and the same having been considered, and the judge being absent from the district and having filed a decision in writing. It is here ordered in accordance with the conclusion therewith, that the plaintiff take nothing by his bill of complaint; and that his complaint be dismissed and that the issues therein be and are hereby decided in favor of the defendant; and that the defendant is entitled to seven hundred and fifty dollars per month for her maintenance since the 14th day of December, 1893, and judgment is ordered accordingly.

JNO. J. HAWKINS,
District Judge.

TITLE OF COURT AND CAUSE.

The decision and judgment in this cause of the Hon. J. J. Hawkins, Judge of the Fourth Judicial District of the Territory of Arizona before whom the cause was tried, having been transmitted to and filed with the Clerk of this Court; and it appearing by the certificate of the Clerk of this Court, that on the 6th day of June, 1896 and seven days prior hereto, the Clerk of this court notified in writing the parties to this suit that the said decision and judgment has been filed with him. It is therefore ordered and directed that the said decision and judgment be entered of record in this court as the decision and judgment of this court.

Dated this 13th day of June, 1896.

A. C. BAKER, Judge.

This cause was appealed to the Supreme Court of the Territory of Arizona and said appeal was perfected on the 29th day of June, 1896.

On the 26th day of January, 1897, appellees filed in said cause, in the Supreme Court of Arizona her remittitur as follows:

TITLE OF COURT AND CAUSE.

Comes now the defendant and appellee herein, Hannah T. Simms, by J. H. Kibby, Millay & Bennet, and W. H. Barnes, her attorneys and remits from the judgment for alimony and counsel fees recovered by the said defendant and appellee, against the plaintiff and appellant herein, in this cause in the District Court, all of the said judgment for alimony and counsel fees, in excess of the sum of Five Thousand ($5,000) Dollars, to-wit the sum of Two Hundred and Fifty ($250) Dollars.

Dated this 26th day of January, 1897.

J. H. KIBBY,
MILLAY & BENNETT,
W. H. BARNES,
Attys. for Defts. and Appellee.

Attest:

J. L. B. ALEXANDER,
[SEAL] Clerk of the Supreme Court of Arizona.

On the 23d day of February, 1897, the Supreme Court affirmed the judgment and decree of the court below, which said judgment of affirmance is as follows:

February 23d, 1896.

TITLE OF CAUSE.

This cause having been heretofore submitted and by the court taken under consideration and the court having considered to same, and being fully advised in the premises. It is ordered that the judgment of the lower court, herein be and the same is hereby affirmed, and it is further ordered, adjudged and decreed that the appellee herein and Wm. Christy and P. J. Cole, the sureties on the Appeal Bond herein, pay the sum of Fifty-Two Hundred and Fifty Dollars and her costs in this court taxed at ninety-seven dollars.

From which judgment of affirmance, appellant appeals to this court.

BRIEF.

I.

We think this court has no jurisdiction in divorce proceedings. Appeals to this court from the Supreme Court of the Territories of the United States, are limited by Chapter 355 of Acts of Congress of 1885, to suits of law and in equity in which the matter in dispute, exclusive of costs, exceeds the sum of Five Thousand Dollars.

We understand the "matter in dispute" is the subject of litigation, the matter for which the suit is brought, and upon which issue is joined.

1 Wall (U. S.) 337.

3 Dall (U. S.) 401.

In an action for divorce the "matter in dispute" is the personal status, the bonds of matrimony existing between the parties. That only is the issue. It certainly cannot be maintained that alimony PENDENTE LITE, to enable the defendant wife to defend herself, is the "matter in dispute" The granting of alimony PENDENTE LITE is a matter discretionary with the trial court. It is aside from and a mere incident to the suit for divorce and its amount in most jurisdictions is not subject to review upon appeal, and we do not think it can be relied upon to confer jurisdiction on appeal to this court. This court would certainly not have jurisdiction on appeal to review a decree granting or refusing a divorce without alimony, and temporary alimony being a mere incident to the issue, is properly to be regarded more as costs in the case and therefore outside the matter in dispute. This is the view already taken by this court.

In Barber vs. Barber, Mr. Justise Wayne, speaking for the court, says:

"We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceedings in chancery or as an incident to divorce A VINCULO, or to one from bed and board."

Barber vs. Barber, 21 How. (U. S.) 582.

The Statutes of Arizona with reference to divorce provide as follows:

"If the wife, whether complainant or defendant, has not sufficient income for her maintenance during the pending of the suit for divorce, the judge may, either in term time or vacation, after due notice, allow her a sum for her support, in proportion to the means of the husband until a final decree shall be made in the case."

Par. 2020 Revised Statutes of Arizona, 1887.

II.

The appellee having remitted all of the said judgment for alimony in excess of $5,000, this court is without jurisdiction.

The revised Statutes of Arizona with reference to remitters, provides as follows:

"817. (Sec. 169.) Any party in whose favor a verdict or judgment has been rendered may in open court remit any part of such verdict or judgment and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment after deducting the amount remitteed."

"818. (Sec. 170.) Any party may make such remitter in vacantion by executing and filing with the clerk a release in writing signed by him or his attorney of record and attested by the Clerk with the seal of his office, such release shall constitute a part of the record of the cause and any execution thereafter issued shall be for the balance only of the judgment after deducting the amount remitted."

"935. (Sec. 297.) If in any judgment rendered in the district court there shall be an excess of damage rendered, and before the plaintiff has entered a release of the same in such court in the manner provided by law, such judgment shall be removed to the supreme court; it shall be lawful for the party whose favor such excess of damages has been rendered to make such release in the supreme court in the same manner as such release is required to be made in the district court; and

upon such release being filed in said supreme court, the said court after revising said judgment, shall proceed to give such judgment as the court below ought to have given if the release had been made and filed therein."

In this case it will be observed, the appeal was taken to the Supreme Court of the Territory immediately after the decree was entered in the District Court and before appellee had remitted any part of the alimony given her by that decree but before the hearing upon the appeal in the Supreme Court, the appellee remitted all of said alimony above the sum of Five Thousand Dollars, (see statement above) which had the effect under the Sections of the Statute above cited, to reduce the said judgment or decree to the sum of Fve Thousand Dollars, without any action of the court to that effect, and the affirmance of the said judgment and decree by the Supreme Court of the Territory was an affirmance of the judgment so reduced to the sum of Five Thousand Dollars.

The judgment of the Supreme Court above shown, is merely the clerk's entry of judgment in the judgment docket. So far as it is affirmance of the judgment of the lower court it is correct, but as far as it assumes to enter a judgment in the Supreme Court of the Territory against the appellant and his sureties on the appeal bond for Five Thousand Two Hundred and Fifty Dollars it is unauthorized and void as before the judgment in the Supreme Court, the judgment of the lower court had been reduced by the remittitur to the sum of Five Thousand Dollars, and no execution could or can be issued for more than that sum.

Par. 816 Rev. Statutes of Arizona.

This court has repeatedly decided that where a judgment is reduced by remittitur to Five Thousand Dollars or less this court is without jurisdiction.

Thompson vs Butler, 95 U. S. 694.

Opeleka City vs. Daniel. 109 U. S. 103.

Alabama Gold. L. Ins. Co., vs. Nichols, 109 U. S. 232.

First Nat. Bank vs. Redick, 110 U. S. 224.

Tex. & Pac. R. R. Co., vs. Horn, 151 U. S. 110.

For the reasons above given the appeal in this cause should be dismissed.

Respectfully submitted.

WILLIAM H. BARNES,
Attorney for Appellee.